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70-336

In the Supreme Court of the United States

OCTOBER TERM, 1970

CHARLES BURKE and ROBERT KEELER,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioners pray that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on December 14, 1970.

OPINION BELOW

The opinion of the Appellate Court is reported at ..... Ill.App.2d ....., 266 N.E.2d 547 (1970), and is reprinted herein as Appendix A, *infra.*

JURISDICTION

The judgment of the Appellate Court (Appendix B, *infra*) was entered on December 14, 1970. No Petition for Rehearing was filed from that judgment. A timely Petition for Leave to Appeal to the Illinois Supreme Court from the judgment of the Appellate Court was denied on March 30, 1971. (Appendix C, *infra*). This Petition is filed within 90 days of the final order of the Illinois Supreme Court denying leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Where a complaining witness had identified a photograph of one of two suspects, had selected a photograph of the second, but was not positive of this selection, and had also selected an unrelated third photograph, and thereafter failed to identify either defendant at a line-up, after which both defendants were viewed at a highly suggestive showup, were petitioners denied due process of law by the admission of eventual in-court identifications and by a ruling of the court below which placed the burden on petitioners to show that the in-court identifications were tainted by the suggestive show-ups.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; * * *"

STATEMENT

Petitioners Charles Burke and Robert Keeler, Chicago police officers for ten and six-and-a-half year respectively, were indicted for, and, following a bench trial in the Circuit Court of Cook County, found guilty of the crimes of theft and bribery in violation of the Illinois Revised Statutes.[1] Petitioners were sentenced to the Illinois State Penitentiary for terms of not less than one year, nor more than one year and a day.

Evidence

The Offense

At 7:45 a.m. on September 7, 1967, Robert Thomas, the manager of a service station, was returning to his station after having driven a lady friend to work. Petitioner Burke, identified as the driver of a squad car which was parked at the curb, motioned for Thomas to pull over. The location at which this occurred bordered the patrol area assigned to Burke and his partner, Petitioner Keeler, for that morning.

Thomas parked his car and then, at Burke's direction, walked to the squad car and entered the rear seat. He testified that the driver of the police car, whom he identified as Burke, asked to see his driver's license, and, after examining it, told him it had been revoked. In a Police Board hearing held six months after the incident, Thomas had testified, under oath, that it was the other officer, identified in court as Keeler, who told him he was driving on a revoked license. Thomas was driving on an unquestionably valid license.

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[1] Ill.Rev.Stat., 1965, Ch. 38, §§ 16-1(c) (theft) and 33-1(d) (bribery).

The officer who had been driving the police car (Burke) subsequently searched Thomas' car, and told him, "You know you do not have a city sticker on that car * * * You can get into a lot of trouble about this". This officer also threatened to report Thomas for leaving his service station during working hours. He then asked Thomas how much money he had with him. Told that Thomas had about seventy-five dollars, the officer instructed him to drop it in the back seat of the police car, which Thomas did. At the prior Police Board hearing, Thomas had said the officer who had not been driving the police car (Keeler) had asked how much money he had with him.

One of the officers next suggested that Thomas should be able to come up with more money and asked if he had any money at the station. Thomas then drove to his station in his car while the officers followed in theirs. Thomas testified that, on arriving, he drove into the station and parked, while the officers remained in their car about one half block from the station. Thomas entered the office, took two hundred dollars in cash from the assistant manager, Curtis Lockhart, and returned to the police car.

Lockhart testified that Thomas drove up to the station in a squad car at approximately 8:00 a.m. Lockhart could only identify the occupants of the police car as "two white officers." Both Burke and Keeler are white. After receiving the two hundred dollars, Thomas walked to the squad car, got in the back seat, and was driven away.

When Thomas returned to the police car, he was asked how much money he had at home and in the bank. He told the officers he had about seven hundred dollars in the bank, plus one hundred dollars in cash and a commission check for about fifty-three dollars at his home. The officers drove him to his home, where he got his bankbook, the cash and the commission check.

Thomas was driven to the bank and instructed to withdraw all the money except one hundred and fifty three dollars so it would not look bad. Thomas' bankbook showed a withdrawal of six hundred dollars on September 7, 1967, and a balance of one hundred fifty-three dollars. He also cashed a commission check for $53.62 at the bank on that date.

Thomas returned to the car and gave the officers the money he had obtained from the bank and his home. One of the officers suggested that he return the two hundred dollars that he had taken from the gas station, so he would not get into trouble with the company. Thomas was then driven to within a few blocks of his gas station, and dropped off.

At trial, Thomas testified that he was with the officers for "about forty five minutes or an hour." (R. 32) At the prior hearing at police headquarters, he had said that he was with the officers from approximately 7:30 or 7:45 A.M. to about 9:30 A.M., or a period of about two hours.

The radio dispatcher at police headquarters from 7:30 A.M. to 3:30 P.M. on September 7, 1967, testified that the defendants' car radio was off the air from 8:02 A.M. until 9:18 A.M. on that date.

The petitioners both testified they did not see Robert Thomas on September 7, 1967, and at no time received any money from him. They made statements to the same effect to officers of the police Internal Inspection Division immediately after the incident.

Keeler and Burke went on duty at approximately 7:30 a.m. Both were dressed in full uniform, including badge and nameplate; they drove a standard marked patrol car with a large number inscribed on each door and on the trunk.

Thomas did not recall seeing the name plates or badges of either of the two officers who stopped him on the morning of September 7, 1967. Nor did he notice the number on the doors and trunk of the patrol car in which the two men rode.

Shortly after they began their patrol, at approximately 7:35 A.M., the petitioners stopped a traffic violator to whom Burke gave a ticket. Then, they called the communications center at police headquarters and reported they were taking the violator into the station to post bond. This resulted in their being taken off the air until they reported to the communications center that they were returning to their patrol. Keeler made this same explanation for their being off the air between 7:50 and 9:30 A.M. in a statement which he gave to the Internal Inspection Division.

The petitioners admitted, however, that they had not accompanied the traffic violator to a police station as they had reported, but rather that they released him upon his posting a bond card, after which they went to the St. Lukes Hospital cafeteria for breakfast. Eating breakfast at the hospital was a regular practice of the two officers, and, although against department rules, was also a common practice among other patrolmen in the district. The "off-the-air" report had been made to enable the officers to take this time for breakfast.

The defendants remained at the hospital cafeteria until about 8:40 a.m., breakfasting with another patrolman, Officer John Williams.

Williams, who often ate breakfast at the hospital, arrived at the cafeteria at approximately 8:05 a.m., and met both defendants. Williams ate with Burke and Keeler, who did not leave the cafeteria for any appreciable

length of time between 8:05 and 8:40 a.m. The defendants bought Williams' breakfast that morning, because the previous day had been his birthday.

Following breakfast, the defendants made their regular crossing guard checks, the first at approximately 8:45 a.m. and the last at 8:51 a.m. (R. 164-5) They then returned to their normal patrol, notifying the police communication center at about 9:15 a.m. that they had returned to duty. (R. 165, 176)

Identification of Petitioners

On the day following the incident, Thomas contacted the Reader's Digest who referred him to the Internal Inspection Division (IID) of the Chicago Police Department. At police headquarters that afternoon, he gave a statement to Sergeant Anderson of the IID, in which he said he knew the men who stopped him were Chicago policemen, "Because they had on a police cap and they had on a uniform and they was driving a Chicago Police car." At trial, Thomas could not describe the particulars of the uniforms the men wore, and he repeatedly said he was "positive" the men did not wear caps.

After making his statement, Thomas examined eight to ten pages of photographs of police officers. From these, Thomas selected three different photographs, one of which was of Officer Burke. He selected a photograph of Keeler but was not positive of this identification.

On the next day, September 9, 1967, Thomas viewed a lineup of uniformed officers at 100 S. Racine Avenue. The lineup was composed of twelve to fifteen white officers, and five to eight black officers. Burke and Keeler were among those in the lineup. Thomas was unable to identify anyone in the lineup.

On the same day he failed to identify the defendants in the lineup, Thomas was taken to the offices of the IID. The officers investigating the case, including Sergeant Anderson (who had previously taken a statement from Thomas), took Thomas into a room occupied solely by Burke and Keeler.

After examining the petitioners in the room, Thomas pointed to Keeler and said, "I am not sure about him." Asked at trial if it was at this point that he identified the defendants, Thomas said, "Not exactly." When Thomas was asked to clarify this last statement, the following exchange took place:

> Q. What did you mean when you said, "Not exactly"?
>
> A. Because in the squad car he didn't have on the glasses and in the lineup there were people wearing glasses.
>
> Q. Who was that?
>
> A. Burke.

At trial, Thomas made an in-court identification of the defendants as the men who had taken his money on September 7, 1967.

Decisions Below

At the trial of this case, which occurred subsequent to the Court's decision in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Stovall* v. *Denno,* 388 U.S. 293 (1967), counsel did not move to suppress the in-court identification of the Petitioners on the ground it was the product of a prior confrontation "so conducive to irreparable mistaken identification" (*Stovall* v. *Denno,* 388 U.S. 293, 301-2) as to have denied the Petitioners due process of law. In-

stead, he attempted in this bench trial to impeach the in-court identifications of Petitioners by showing 1) the witness' selection of three photographs prior to the lineup; 2) the witness' failure to identify either Petitioner at the lineup; and 3) the suggestive atmosphere at the showup in IID headquarters and the witness' failure to identify Keeler even under these circumstances. (R. 71-2, 85-9; Ex. 17, 21-3)[2]

Petitioners claimed in the Illinois Appellate Court that they were denied due process of law by the admission into evidence of an in-court identification which was the product of an identification procedure so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable mistaken identity. This claim was necessarily bifurcated. First, Petitioners asserted that the procedure by which they were identified was so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable mistaken identity. Moreover, the claim continued, the in-court identifications were solely the product of this procedure.

Answering these contentions, the Appellate Court ruled: "It should be noted that this matter was not raised until after the trial of this cause. Neither a pre-trial motion was made to test the question, nor were objections made to the identification testimony at the time it was given at

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[2] "R....." references are to the page of the Record on Appeal, filed in the Appellate Court of Illinois, First Judicial District. "Ex....." references are parallel, and refer to the page of the Excerpts from the Record, also filed in the Appellate Court pursuant to Illinois Supreme Court Rule 342(a) (Ill.Rev.Stat., 1969, Ch. 110A, §342(a)).

trial. * * *'" (App. A, *infra*, p. 7) Despite this suggestion of the possibility of waiver,[3] the Court continued:[4]

> "Nevertheless, it is clearly borne out by the record that Thomas never had a doubt as to the identity of Burke, as is evidenced by his selection of Burke's photograph the day following the incident. Thomas was with Burke a considerable length of time during the incident, and his attention was quite apparently drawn primarily to Burke, who did most of the talking and demanding during the incident. The record reveals that Thomas' in-court identification of Burke had a pre-trial origin independent of the later face-to-face confrontation at police headquarters. The proscrip-

[3] The quoted phrase in the Opinion of the Appellate Court was followed by citations to *People* v. *Williams*, 28 Ill.2d 114, 190 N.E. 2d 809 (1963), and *People* v. *Trefonas*, 9 Ill.2d 92, 136 N.E.2d 817 (1956). *Williams* held that the defendant's failure to object at trial to a co-defendant's introduction of evidence of a confession by Williams, after the prosecution had promised not to use the confession — thus forestalling a ruling on a pre-trial motion to suppress the confession — constituted a waiver of the right to complain of the admission of that evidence. In *Trefonas* the defendant failed to object to the admission of hearsay evidence, causing the Illinois Supreme Court to rule that the failure to take proper action at the time of the admission of incompetent evidence "generally constitutes a waiver of the right to object and cures the error, if any." (136 N.E.2d at 820) As a consequence, the Court concluded that it was precluded from examining the question as to the admissibility of the evidence.

[4] Illinois does have a "plain error" rule — Illinois Supreme Court Rule 615(a) (Ill.Rev.Stat., 1969, Ch. 110A, §615(a); and see, *People* v. *Burson*, 11 Ill.2d 360, 143 N.E.2d 239 (1957), which explains that the rule that a point not raised at trial is waived on appeal "is a rule of administration and not of jurisdiction or power, and it will not operate to deprive an accused of his constitutional right to due process." (143 N.E.2d at 245.) See also, *People* v. *Cage*, 34 Ill.2d 530, 216 N.E.2d 805, 807 (1966); *People* v. *Weinstein*, 35 Ill.2d 467, 220 N.E.2d 432, 434 (1966).

tions set out in United States v. Wade, 388 U.S. 218, have not been violated.

> "As to the in-court identification of Keeler, Thomas had earlier stated that he was not certain that Keeler was the other of the two officers involved in the incident and admitted as much at the face-to-face confrontation. The in-court identification of Keeler was not absolutely necessary to sustain the conviction since sufficient independent evidence placed Keeler at the scene on the morning in question, buttressing Thomas' earlier tentative identification of Keeler. See Harrington v. California, 395 U.S. 250." (App. A, *infra,* p. 7).

On Petition for Leave to Appeal to the Illinois Supreme Court, Petitioners questioned whether this ruling of the Appellate Court had not improperly cast a burden on them to show that their in-court identification was dependent on the show-up, rather than placing the burden on the prosecution to establish the independence of the in-court identification "by clear and convincing evidence."

REASON FOR GRANTING THE WRIT

A reading of the Opinion of the Illinois Appellate Court reveals that what that Court concluded was not that the prosecution had carried its burden of proving an independent basis by "clear and convincing" evidence, but that evidence of such independence was available from the record. This Court, in *United States* v. *Wade*, 388 U.S. 218, more than suggested that, while the burden is initially on the defendant to show that the identification procedure was so suggestive as to violate due process, once he has done so the burden shifts to the prosecution to demonstrate by "clear and convincing" evidence that the in-court identification has, or will have, a basis independent of the condemned procedure.[5] (388 U.S. at 240-2.) See also, *Gilbert* v. *California*, 388 U.S. 263, 272 (1967). Subsequent experience, however, has demonstrated that trial courts are not as fully acquainted with this principle as they are with the major principles announced in *Wade*, *Gilbert* and *Stovall* v. *Denno*, 388 U.S. 293 (1967). *Cf. United States ex rel. Trignani* v. *Russell*, 3rd Cir. 1968, 405 F.2d 1119, 1121; *Cooper* v. *Picard*, 1st Cir. 1970, 428 F.2d 1351, 1353. The result has been, as evidenced by this case, that the extended inquiry of the type suggested by *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963), and *Murphy et al.* v. *Waterfront Commission*, 378 U.S. 52, 79 n. 18 (1964)

[5] The United States Court of Appeals for the Second Circuit has construed the language in *Gilbert* as requiring proof "beyond a reasonable doubt that the in-court identification had an 'independent source'." *United States ex rel. Stevenson* v. *Mancusi*, 2nd Cir. 1969, 409 F.2d 801, 803.

into the question of possible or potential taint has largely been bypassed in favor of a less extensive inquiry as to whether evidence of an independent basis is available from the record.

In using this case as illustrative of the failure of lower courts to appreciate the vital difference between a test based on the availability of an independent basis and one based on clear and convincing proof of such a basis, we start with the assumption — almost patent from the failure of opinion of the Illinois Appellate Court to discuss the issue — that there is no question concerning the illegality and consequential suggestiveness of the show-up at the IID offices. See *Stovall* v. *Denno,* 388 U.S. 293; *Foster* v. *California,* 394 U.S. 440, 442-3 (1969); *Crume* v. *Beto,* 5th Cir. 1967, 383 F.2d 36, 39; *Palmer* v. *Peyton,* 4th Cir. 1966, 359 F.2d 199, 202; *United States ex rel. Stevenson* v. *Mancusi,* 2nd Cir. 1969, 409 F.2d 801, 802. But, because a basis for the in-court identification could be found in the witness' identification of Burke's photograph — as well as Keeler's[6] — his *subsequent* failure to identify either officer at the line-up and Keeler in the show-up, was deemed to have no bearing on the specific issue of whether the prosecution had carried its burden of proof.

But if the constitutional mandate set forth in *Wade, Gilbert* and *Stovall* is to have any meaning at all, the burden which they seem to intend to place on the prosecution must be articulated and enforced. Once again, this case serves to illustrate the point. Two disparate evidentiary routes were available to the courts below. On the one hand, there was evidence that the witness was capable of identifying the Petitioners because of his initial iden-

[6] Thomas' testimony was equivocal concerning his selection of Keeler's photograph. He said he selected the photograph, but he was not positive in his identification. (R. 35-6)

tification of their photographs. But Thomas selected three photographs of the two men he said were involved in the incident. One photograph was of Burke; a second may have been Keeler's, but Thomas was not positive of this identification; the record does not disclose the identity of the man in the third photograph.

On the other hand, there was unequivocal evidence that Thomas was wholly unable to identify either Petitioner at the post-*Wade/Gilbert* line-up on which the record is silent as to whether the Petitioners' rights to counsel were observed.[7] Despite the fact that this line-up took place

[7] The Appellate Court seemed to suggest that the line-up was unfairly conducted — in favor of Petitioners. The Opinion credits Thomas' excuse that he was unable to identify Burke at the line-up because Burke was wearing glasses at the time, and the officers who stopped Thomas were not. (App. A, *infra*, p. 5) Aside from the fact that participants in a line-up are customarily required to remove their glasses, if the perpetrators of the crime did not wear glasses, or if the complainant voices his inability to make an identification because a possible suspect is wearing glasses (see Wall, Eye-Witness Identification in Criminal Cases, p. 54 (1965)), Thomas did not clearly state that his failure to identify Burke at the line-up was due to his wearing glasses. Thomas was asked on cross-examination if he first made his identification at the private show-up. He answered, "Not exactly." Asked to clarify this statement on redirect examination, he said: "Because in the squad car he didn't have on the glasses and in the line-up there were people wearing glasses." When then asked, "who was that?" Thomas replied, "Burke." The Opinion also excuses Thomas' failure to identify the defendants in the line-up because of the number of persons who were employed as "suspects" by the I.I.D. Thomas said eighteen were placed in the line-up. He could not remember how many were white and how many were black. Keeler said there were 12 to 15 white and 5 to 8 black officers in the line-up. Thus, Thomas, who if he was certain about anything was certain about the fact that the two officers who stopped him were white, was really called upon to select the offenders from a group of from 9 to 15 officers, hardly an inordinate number in view of Thomas' prior inspection of photographs.

subsequent to the photographic identification, and despite the existence of factors recognized by *Wade* (388 U.S. at 241) as helpful in making a valid identification, Thomas failed to identify either Petitioner. The bearing this failure had on Thomas' earlier photographic selections, and on his eventual in-court identification was given no weight by the Illinois Court, assumedly on the supposition that the IID officers, who went to illegal lengths later in the day to have the Petitioners identified, originally went to opposite extremes to prevent an identification at the line-up. (See footnote 7, *supra.*)

This determination by the Illinois Court of the independence of Thomas' in-court identification does violence, we submit, to the spirit of the principles announced in *Wade, Gilbert* and *Stovall.* It is, we also submit, representative of problems encountered daily by trial courts in attempting to apply those principles in a meaningful manner.

CONCLUSION.

For the foregoing reason, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE APPELLATE COURT

Mr. Justice Burke Delivered the Opinion of the Court:

Defendants were charged in a three-count indictment with two counts of theft and one count of bribery, all arising out of the same transaction. Trial by jury was waived, and defendants were found guilty at a bench trial on all three counts. Defendants' motion in arrest of judgment was allowed as to one of the theft counts and defendants were sentenced to a term of one year to one year and one day in the penitentiary on the other two counts. They appeal.

At approximately 7:55 A.M., on September 7, 1967, complaining witness Robert Thomas was driving an automobile easterly along Roosevelt Road in Chicago, after having dropped off a lady friend at her place of employment. Thomas, 23 years of age, was about to return to the automobile service station which he managed at 3731 West Roosevelt Road when one of two uniformed Chicago police officers sitting in a marked patrol car parked near the intersection of Loomis Street and Roosevelt Road motioned for him to pull his automobile over to the curb. The intersection was within patrol car beat area 1205 which had been assigned that morning to the defendants, who were Chicago police officers.

Thomas testified that he pulled his automobile to the curb and that when he alighted from the vehicle, he was told by one of the officers to get into the back seat of the patrol car, which he did. Thomas identified defendant

Burke as the officer on the driver's side of the patrol car and defendant Keeler as the officer occupying the right front seat of the police vehicle.

Thomas was asked by Officer Burke to produce his driver's license and was told by Burke after examination of the license that it had been revoked; the license was in fact valid. Officer Burke thereupon went to Thomas' automobile, returned to the police vehicle, and told Thomas that his vehicle's windshield was lacking a city sticker and that Thomas "can get into a lot of trouble about this." Thomas testified that the officer also threatened to report him to the oil company for which he worked for having left the station during working hours, which Thomas feared might have led to the loss of his employment.

Officer Burke then asked Thomas how much money he had on his person, and Thomas replied that he had about $75. The officer told Thomas to drop the money on the rear seat, which Thomas did. Officer Burke then stated to Thomas that since he was the manager of a service station he should be able to raise more than $75. Thomas testified that he drove his automobile to the filling station where he worked, while the two officers followed in their vehicle. Thomas entered the station, received $200 from his assistant station manager, Curtis Lockheart, and returned to the waiting police car.

Thomas testified that upon his return to the police vehicle he was asked by Officer Burke where he lived and how much money he had in the bank. Thomas told the officer where he lived and stated that he had about $600 or $700 in the bank. Thomas was driven to his home, was told to get his passbook, and was also told to get some additional cash and a commission check which the officers learned were at the house. Thomas was driven to the bank

and was directed by the officers to withdraw all but $153 of the account "so it won't look bad." Thomas withdrew $600 from the account and cashed the commission check, all of which he turned over to the officers. The officers returned to Thomas the $200 which had been taken from the service station so that Thomas "would not get into trouble with the oil company." Thomas was then taken back to the vicinity of the service station and let out of the patrol car. He walked back to the station and returned the $200 to Lockheart.

Curtis Lockheart testified that Thomas entered the station between 8:00 A.M. and 8:15 A.M. on September 7, 1967 and asked the witness for $200. After receiving the money, Thomas left the station and entered a waiting police car occupied by two officers. Lockheart further testified that Thomas returned to the station with the $200 about 9:15 A.M.

It was undisputed that Officers Burke and Keeler were assigned to beat 1205 on the day in question, between the hours of 7:30 A.M. and 3:30 P.M. There is also evidence that a call was received at 8:02 A.M. at the police communications center taking the radio of beat 1205 patrol car off the air, and that the radio was placed back on the air at 9:18 A.M.

On the day following the incident Thomas telephoned an information service for assistance, which in turn referred to the Internal Inspections Division (I.I.D.) of the Chicago Police Department. Thomas testified that he gave a statement to an investigating officer of the I.I.D. and that he also viewed "maybe fifty or sixty or more" photographs of police officers. He testified that he selected a photograph of Officer Burke; that he selected a second photograph, which he tentatively identified as that of Officer Keeler,

"but was not positive"; and that he also selected a third photograph.

Two days after the incident Thomas viewed a line-up consisting of between 17 and 23 uniformed Chicago police officers, including both defendants, but was unable to identify the defendants therein. Thomas was thereafter taken to a room occupied solely by the defendants, where he again identified Burke, but stated concerning Keeler, "I am not sure about him." It appears that Burke, during the line-up, was wearing eyeglasses, whereas he was not wearing them in the police vehicle two days before. Thomas made an in-court identification of both defendants.

Both defendants testified in their own behalf and denied either seeing Robert Thomas on September 7, 1967 or taking any money from him on that date. In a statement given to investigators from the I.I.D., defendant Keeler related that at approximately 7:30 A.M. on the day in question, he and Burke stopped a traffic violator to whom Officer Burke gave a citation. Keeler related that they then called the police communications center and reported that they were going off the air in that they were taking the violator to the police station to post bond. Keeler also related that this was the reason their car radio was off the air for the indicated period of time.

At trial, however, both defendants admitted that they had not accompanied the violator to the station but that the violator had given the officers a bond card at the scene. They testified that they then used the "off-the-air" time to eat breakfast at St. Luke's Hospital cafeteria, admittedly a violation of Chicago Police Department rules, remaining there in the presence of Chicago Police Officer John Williams until 8:40 A.M. The defendants then proceeded to make routine crossing guard checks at several

area schools, after which they returned to their normal patrol, notifying police communications center of their return to duty about 9:15 A.M.

Officer Williams testified for the defense that he had eaten breakfast with the two defendants from about 8:05 A.M. until 8:40 A.M., on the day in question, and that defendants had purchased his breakfast that morning because his birthday was the day before.

Defendants first contend that the State failed to prove their guilt beyond a reasonable doubt. They argue that the identification of the defendants by Thomas was doubtful, and raises a serious doubt of guilt especially when viewed in the light of the defendants' alibi evidence.

Defendants' argument fails to differentiate between Thomas' identification of Burke and his identification of Keeler. The record is clear that Thomas never had any doubts about the identity of Burke, whom Thomas testified did most of the talking and demanding during the incident. Thomas selected a photograph of Burke at police headquarters the day following the incident and also identified Burke after the line-up. It is true that Thomas failed to identify Burke at the line-up, but it appears that during the line-up Burke was wearing eyeglasses, whereas he was not wearing them during the incident two days before. Further, Burke was positioned among 17 to 23 other uniformed officers in the line-up, an unusually large number of people to be participating in a line-up. These were matters for the determination by the trier of fact.

With regard to Thomas' identification of Keeler, Thomas candidly admitted that he was uncertain of the identification although he did select a photograph of Keeler at the same time that he selected the photograph of Burke. This uncertainty went to the weight and credibility of Thomas'

testimony in this regard, and not to the admissibility thereof. People v. Holt, 124 Ill. App. 2d 198. Furthermore, Thomas' identification of Keeler, however uncertain, was strongly corroborated and bolstered by the Chicago Police Department records, and the testimony of the defendants themselves, that Burke and Keeler were assigned to work together on the morning in question.

Also corroborating the evidence adduced by the complaining witness are the police records which show that the defendants were assigned to the beat where the complaining witness testified that the incident commenced and which also show that the radio in the patrol car assigned to the defendants that morning was taken off the air during substantially the same time the complaining witness testified that he was with the defendants, which also closely corresponded to the time periods testified to by Lockheart.

The matters raised concerning Thomas' conflicting testimony relating to the wearing apparel and police insignia of the officers, the markings on the police vehicle, the amount of time spent with the officers, and the like, were likewise for consideration by the trier of fact. Before the trier of fact was the complaining witness' testimony that he was extremely frightened and nervous during the incident, which could account for such conflicting testimony. The evidence is not so improbable or unsatisfactory as to justify a reversal of the convictions. People v. Jackson, 95 Ill. App.2d 28. (See also People v. Appleby, 104 Ill. App. 2d 207; People v. Minor, 95 Ill. App. 2d 447, cited by defendants, which are distinguishable on their facts from the case at bar. There was ample independent evidence linking the defendants with the crimes, corroborating the evidence given by the complaining witness.)

Defendants also contend that they were denied due process of law when the court allowed Thomas to identify them in court, since the pre-trial confrontations between Thomas and the defendants were unnecessarily suggestive.

It should be noted that this matter was not raised until after the trial of this cause. Neither a pre-trial motion was made to test the question, nor were objections made to the identification testimony at the time it was given at trial. (See People v. Williams, 28 Ill. 2d 114; People v. Trefonas, 9 Ill. 2d 92.)

Nevertheless, it is clearly borne out by the record that Thomas never had a doubt as to the identity of Burke, as is evidenced by this selection of Burke's photograph the day following the incident. Thomas was with Burke a considerable length of time during the incident, and his attention was quite apparently drawn primarily to Burke, who did most of the talking and demanding during the incident. The record reveals that Thomas' in-court identification of Burke had a pre-trial origin independent of the later face-to-face confrontation at police headquarters. The proscriptions set out in United States v. Wade, 388 U.S. 218, have not been violated.

As to the in-court identification of Keeler, Thomas had earlier stated that he was not certain that Keeler was the other of the two officers involved in the incident and admitted as much at the face-to-face confrontation. The in-court identification of Keeler was not absolutely necessary to sustain the conviction since sufficient independent evidence placed Keeler at the scene on the morning in question, buttressing Thomas' earlier tentative identification of Keeler. See Harrington v. California, 395 U.S. 250.

For these reasons the judgments are affirmed.

Judgments Affirmed.

McCormick, P.J., and Lyons, J., concur.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable JOHN V. MCCORMICK
Presiding Judge.

Present The Honorable JOSEPH BURKE *Judge.*

Present The Honorable JOHN J. LYONS *Judge.*

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee

No. 53554 vs.

CHARLES BURKE AND ROBERT KEELER,
Appellants

Appeal from the Circuit Court of Cook County
(No. 67-4470)

AFFIRMING ORDER

The judgments of the Circuit Court of Cook County are AFFIRMED.

December 14, 1970.

APPENDIX C

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday, the* eighth *day of* March *in the year of our Lord, one thousand nine hundred and* seventy-one, *within and for the State of Illinois.*

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER

JUSTICE DANIEL P. WARD

JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE CHARLES H. DAVIS

JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: JUSTIN TAFT, CLERK

BE IT REMEMBERED, *that, to-wit: on the* 30th *day of* March 1971, *the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

PEOPLE STATE OF ILLINOIS,

Respondent

No. 44025 vs.

CHARLES BURKE AND ROBERT KEELER,

Petitioners

Petition for Leave to Appeal from Appellate Court

First District 53554

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-336

CHARLES BURKE and ROBERT KEELER,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

(On Petition for Writ of Certiorari To The Appellate Court Of Illinois, First Judicial District)

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

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CHARLES BURKE and ROBERT KEELER,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

(On Petition for Writ of Certiorari To The Appellate Court Of Illinois, First Judicial District)

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a reviewing court may determine from the record on appeal that a witness had an independent basis for an in-court identification?

CONSTITUTIONAL PROVISIONS INVOLVED

The issue in this case involves the due process clause of the fourteenth amendment.

STATEMENT OF THE CASE

The petitioners Charles Burke and Robert Keeler were charged with two counts of theft and one count of bribery by an indictment returned in December of 1967 by the Cook County Grand Jury. At the time of the offenses charged, both men were Chicago police officers (R. 119) and Robert Thomas, the complaining witness was a gas station manager for the Martin Oil Company (R. 5).

On the morning of September 7, 1967, Thomas and a woman friend left his gas station located at 3731 West Roosevelt Road in Chicago. Thomas drove the woman to work and then continued driving in an easterly direction along Roosevelt Road. (R. 5-9). He was stopped by two policemen parked in a squad car at the side of the road. They directed him to get into the rear seat of the squadrol which he did. (R. 10-11). The time was approximately 7:55 A.M.

The officer driving the car who was later identified as Officer Burke, told Thomas that he was driving with a revoked license (R. 14). In fact, the license was not revoked and was valid at that time (R. 14). Burke then got out of the squad car and searched Thomas' car. When he returned, he told Thomas that he did not have a City Sticker and said "you can get in a lot of trouble about this." (R. 16). Burke then asked Thomas how much money he had (R. 16). When Thomas answered that he had about $75, Burke told him to drop the money on the back seat, which he did. (R. 19). Noting that Thomas was the manager of a gas station, Burke stated that he should have more than $75 and instructed Thomas to get into his car and drive back to the station. Officers Burke and Keeler followed in the squad car. (R. 20). Thomas got $200 from the assistant manager of the station and returned to his position in the rear seat of the squad car.

Burke then asked Thomas if he had any money at home or in the bank. Thomas answered affirmatively and the officers then drove him to his home to pick up his bank book, $100.00 in cash and a $53.00 check (R. 22-25). Thomas again returned to the squad car and the three men proceeded to Thomas' bank. Burke instructed Thomas to "go in and draw all the money out except $153 so it won't look bad." (R. 26). Thomas withdrew $600 from his savings account, returned to the squad car and turned over the $600 and the money which he had picked up at his home to Officer Keeler, who had been seated in the right front seat of the car throughout the above proceedings. (R. 33). Keeler counted the money and informed Burke that it was all there. (R. 33).

The officers drove Thomas back to the gas station and told him to return the $200 to the assistant manager so that the oil company would not become involved. Thomas returned to the station at about 9:15 a.m.

The following day Thomas contacted the Internal Inspections Division (I.I.D.) of the Chicago Police Department having been referred to them by a public information service. Thomas gave a statement to an investigating officer of the I.I.D. and viewed "50 or 60 or more" photographs of police officers (R. 69-71). From these, Thomas chose three photographs—one of Officer Burke, one which he tentatively identified as Officer Keeler, and a third unidentified photo. (R. 71-72).

Two days after the offense, Thomas viewed a lineup consisting of eighteen (18) police officers, all of whom were in uniform (R. 87). The participants in the lineup

were both white and black. (R. 87). Thomas identified no one in the lineup.[1]

After the lineup, Thomas was taken to a room occupied by Burke, Keeler and an investigating officer, where he again identified Burke. (R. 103).

Both petitioners waived a trial by jury. Robert Thomas testified to the circumstances surrounding the commission of the offense on direct examination by the State and made a courtroom identification of both Burke and Keeler. Defense counsel on cross examination, brought out the circumstances of the pretrial identifications.[2] Thomas' testimony was corroborated by the testimony of Curtis Lockheart, the Assistant Manager of the gas station which Thomas managed and the testimony of various police officers concerning the area assigned to the petitioners for patrol on the day of the offense and concerning the time at which the petitioners were not receiving calls on their police radio on that date.[3]

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1. The record reflects that at the time of the lineup officer Burke was wearing glasses while at the time of the offense he was not wearing glasses (R. 103). Petitioners' attempts to obscure the record here by references to the usual procedure at lineups are inappropriate.

2. The defense made no pretrial motion to suppress the identification of either petitioner and further made no objection to the courtroom identification of the petitioners by Thomas (R. 11-12).

3. At trial both petitioners testified that they had reported arresting a traffic violator and had stated they were taking him to the station to post bond, thus taking their patrol car off of the air. Both petitioners testi-

Both petitioners testified in support of their alibi defense that they had been eating breakfast at the time of the offense charged. Officer John Williams testified that he had met the petitioners for breakfast at about 8:00 A.M. on the date of the offense (R. 193-195).

After hearing this evidence, the trial court found the petitioners guilty of the offenses of theft and bribery and sentenced each man to a term of one year to one year and one day on the charges.

The Appellate Court of Illinois, First District affirmed the conviction and sentence, *People* v. *Burke and Keeler*, 266 N.E. 2d 547 (Ill. App. 1970). The Supreme Court of Illinois denied Leave To Appeal without written opinion. The petitioners then filed the instant Petition for writ of certiorari to the Appellate Court of Illinois, First District pursuant to Title 28 U.S.C. § 1257(3).

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fied that this report was false and was an excuse to enable them to take time to have breakfast at a hospital cafeteria in the area in violation of departmental rules. (R. 160-164, 173-176, testimony of Officer Keeler; R. 180-186, 191, testimony of Officer Burke).

REASON FOR DENYING THE WRIT

I.

THE APPELLATE COURT OF ILLINOIS APPLIED THE PROPER STANDARD IN DETERMINING THAT THE COURTROOM IDENTIFICATIONS, TO WHICH NO OBJECTION WAS MADE AT TRIAL, COMPLIED WITH THE REQUIREMENTS OF DUE PROCESS.

The petitioners' argument before this Court is grounded on the theory that the Appellate Court of Illinois applied an improper standard in sustaining the propriety of the courtroom identifications of each of the petitioners by the complaining witness Robert Thomas. They argue that although proof of an independent basis for the courtroom identifications was available from the record, that the reviewing court applied an improper standard by failing to state that the prosecution had sustained its burden of proof by clear and convincing evidence (Petr's. Br. 12). This argument is a tardy attempt to correct an unsucessful trial strategy and necessarily must fail when viewed in light of the record in this case and relevant opinions of this Court.

Initially, it must be noted that the identification procedures utilized in this case were employed subsequent to the decisions of this Court in *United States* v. *Wade*, 388 U.S. 218 (1967), *Gilbert* v. *California*, 388 U.S. 263 (1967) and *Stovall* v. *Denno*, 388 U.S. 293 (1967). As petitioners correctly point out, the record below is silent as to whether the petitioners were represented by counsel at the lineup held two days after the offense. This point becomes irrelevant in the context of this case, however,

since the prosecution did not introduce evidence of the lineup at trial.[4] Rather, the defense brought out the fact of the witness' prior identifications of the petitioners on cross examination in an attempt to impeach the credibility of Thomas' courtroom identification of each man. The defense never at any time raised an objection to the courtroom identifications but relied solely upon its expressed strategy of impeaching the credibility of these identifications. The petitioners thus have waived any objection to the pretrial as well as to the courtroom identifications. See, *State* v. *McDonald,* 184 N.W. 2d 886 (Wis. 1971); *Commonwealth* v. *Underwood,* 265 N.E. 2d 577 (Mass. 1970); *Lewis* v. *Commonwealth,* 463 S.W. 2d 137 (Ky. 1970); *State* v. *Cole,* 184 N.W. 2d 75 (Wis. 1971); *People* v. *Gonzales,* 261 N.E. 2d 605 (N.Y. 1970); *Reese* v. *State,* 457 S.W. 2d 877 (Tenn. Crim. 1970); *Wright* v. *State,* 457 S.W. 2d 55 (Texas 1970); *Poole* v. *Commonwealth,* 176 S.E. 2d 285 (Va. 1970); *Williamson* v. *Commonwealth,* 175 S.E. 2d 285 (Va. 1970); *State* v. *Hayes,* 182 N.W. 2d 199 (Neb. 1970).

In a somewhat belated attempt to resurrect a possible objection to the in-court identifications, the petitioners now assert that the finding of the Appellate Court upon the record below that the identifications made at trial had a basis independent of any pretrial identification procedures was erroneous because it in some way abrogates the duty of the prosecution to prove an independent basis by clear and convincing evidence.

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4. Although petitioners, having participated in the lineup and the showup, obviously were aware of the identification procedures employed, they made no pretrial motion to suppress any of the identification evidence.

The simple answer to this argument is that the prosecution's duty to prove by clear and convincing evidence that a witness' courtroom identification has a basis independent of any improper lineup procedures arises only after a showing of primary illegality in the pretrial procedures and after proper and timely objection to the courtroom identification by the witness. In *United States* v. *Wade*, 388 U.S. 218 (1967), this Court considered the question "whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required * * * the grant of a new trial at which such evidence is to be excluded." (388 U.S. at 239-40). Finding a *per se* rule of exclusion of the courtroom identification to be unjustified in this situation, this Court found the proper test for determining the admissibility of a questioned courtroom identification to be "'[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) as quoted in *United States* v. *Wade*, 388 U.S. 218, 241 (1967).

In the instant case there has been no finding of illegality in the pretrial identification procedures due to the defense's failure to object by a motion to suppress prior to trial.[5] Absent such an objection and hearing at which

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5. Two states have treated the question of who bears the burden of proof as to primary illegality and held this burden to be on the defendant. People v. Caruso, 436 P. 2d 336 (Cal. 1968); People v. Rodriguez, 88 Cal. Rptr. 789 (1970); People v. Nelson, 238 N.E. 2d 378 (Ill. 1968); People v. Johnson, 257 N.E. 2d 3 (Ill. 1970).

the relevant facts concerning the pretrial identification procedures (such as whether the petitioners were represented by counsel) could have been established, the record in this case is insufficient to establish primary illegality in these procedures.

Even assuming for purposes of argument that such primary illegality has been established in this case, the defense never objected at trial to the courtroom identifications made by the complaining witness. Petitioners admit that as part of their trial strategy they chose not to object to the identifications, but rather to attempt to impeach the witness' credibility by bringing out the details of the witness' earlier opportunities for identification of the petitioners. See *United States* v. *Wade*, 388 U.S. 218, 248 (1967) (opinion of Mr. Justice Black concurring in part and dissenting in part). Having made this decision, they cannot object now to the absence of a formal hearing to determine whether the prosecution has established by clear and convincing evidence that the witness' courtroom identifications had a basis independent of any pretrial identification procedures. Compare *Gilbert* v. *California*, 388 U.S. 263, 271 (1967).

After noting that the petitioners had failed to raise timely objection to the courtroom identifications, the Appellate Court of Illinois reviewed the record of this case and found sufficient facts to allow an informed judgment that the courtroom identifications had an independent source. This procedure is entirely proper and is consistent with the practice followed by this Court in reviewing similar challenges. See *United States* v. *Wade*, 388 U.S. 218, 242 (1967) ("*On the record now before us* we cannot make the determination whether the in-court identifications had an independent origin."); *Gilbert* v. *California*, 388 U.S. 263, 272 (1967) (". . . *the record* does

not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source."); *Coleman* v. *Alabama*, 399 U.S. 1, 5 (1970) ("It cannot be said *on this record* that the trial court erred in finding that Reynolds' in-court identification of the petitioners" had an independent basis).

In the instant case the record reflects that the witness' courtroom identifications had a basis independent of any pretrial identification procedures. Robert Thomas had an opportunity to observe both petitioners over a period of approximately one and one-half hours at very close range in broad daylight. As the Appellate Court noted in its opinion, Thomas' attention was drawn particularly to petitioner Burke since he did most of the talking and was the person giving instructions to Thomas. On the day following the incident, the witness positively identified Burke and tentatively identified Keeler from a group of fifty to sixty or more photographs. The identification of Keeler is substantiated by strong corroborative evidence —he was Burke's partner on the day of the offense, they were assigned to patrol the area in which the crime occurred, and both he and Burke admitted that they were together at the time of the crime. In light of the lengthy period of observation and the photographic identifications made from a large group of photos, the record in this case reflects a sufficient independent basis for the courtroom identifications made by the witness. The Appellate Court of Illinois applied the proper standard in reviewing the record of the instant case. Allegations of error raised by the petitioners are without merit.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the petition for a writ of certiorari to the Appellate Court of Illinois, First Judicial District be denied.

Respectfully submitted,

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